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In The
Supreme Court of the United States
October Term, 1986

SAN MARCOS COUNTY WATER DISTRICT,
Petitioner,

vs.

SAN MARCOS UNIFIED SCHOOL DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent San Marcos Unified School District respectfully prays that this Court deny the San Marcos County Water District's petition for a writ of certiorari to review the decision of the California Supreme Court which held that sewer capacity fees are special assessments

from which public entities such as Respondent San Marcos Unified School District are impliedly exempt.

STATEMENT OF THE CASE

Petitioner San Marcos County Water District (hereinafter referred to as "Water District") is a public agency which provides water and sewer services within the North County Judicial District of San Diego County, California, and is organized and exists pursuant to California Water Code §§ 30000-33249, commonly known as the County Water District Law. Respondent San Marcos Unified School District (hereinafter referred to as "School District") is a public agency which provides educational services in the North County Judicial District of San Diego County and is organized and exists pursuant to Chapter 3 of Division 2 of Title 2 of the California Education Code, §§ 35500 *et seq.* School District's territory exceeds Water District's territorial boundaries, although all of School District's currently used school sites are within Water District's territory.

In 1971 and in subsequent years, predecessors of School District applied to Water District for sewer service to serve School District's facilities. Water District has charged School District connection fees and monthly sewer service charges. School District does not deny its obligation to pay such fees and charges and has paid them and will continue to do so. There is no issue as to the connection fees and monthly service charges.

On the other hand, there was a dispute about School District's obligation to pay the capacity fees Water District has imposed. From time to time since the imposition of the fees, discussions were held between School District's various superintendents and administrative personnel and member of Water District's Board wherein School District complained about the imposition of the capacity fees. Between 1971 and 1981, School District paid the capacity fees under protest. Since 1981, School District has refused to pay the capacity fees, asserting that it is exempt from the assessment of the fees.

The capacity fees are based upon a charge for each "dwelling unit equivalent," which is defined as waste flow up to 250 gallons per day. The fee for schools is $2,400.00 per dwelling unit equivalent, one dwelling unit equivalent equalling ". . . 25 students, faculty, and administrators, et cetera. . . ."

There is a review during the third week of October of every year to determine the census and the amount of capacity fees then due and payable for an increase in the census over the previous years. In fact, however, at no stage in this matter has Water District ever presented any proof to substantiate its claim that School District's use of the sewer facilities has created any need for additional capacity.

This matter was commenced upon the filing of an Agreed Case on November 15, 1983, pursuant to California Code of Civil Procedure § 1138. Basically, the Agreed Case stipulated that the dispute between Water District and School District centered on the legality of Water District's assessment of sewer capacity fees (hereinafter "ca-

pacity fees''). (*See* Paragraphs 6 and 14 of Appendix G of the Petition for Writ of Certiorari).

After briefs were filed and argument was heard, the trial court found that School District had entered into a contract with Water District and was obligated to pay the capacity fees; that California Education Code § 39613 authorized School District to enter into the contract; and that California Water Code § 31101.5, which was effective on January 1, 1983, authorized the assessment of the capacity fees after that date. (*See* Appendix C of the Petition for Writ of Certiorari).

School District's subsequent motions for new trial or to vacate and set aside the judgment and reopen for further proceedings were denied. School District appealed to Division One of the Fourth District Court of Appeal. On August 19, 1985, the appellate court filed its opinion, which affirmed the trial court's decision but did not follow its reasoning. In fact, the appellate court discussed economic theory and relied upon out-of-state case law to support its affirmance. It found that the capacity fee imposed by Water District was a valid ''user charge'' and not an invalid assessment. (*See* Appendix B of the Petition for Writ of Certiorari).

The opinion of the Court of Appeal was in direct conflict with precedent established by at least three other published California appellate opinions. The appellate court's total and explicit deviation from California law rendered review of the matter by the California Supreme Court necessary and desirable. School District petitioned the California Supreme Court to review the matter and re-

solve the conflict among the lower appellate courts, and it agreed to do so.

The California Supreme Court reversed the judgment of the trial court and the decision of the intermediate appellate court. It held that the capacity fee is a special assessment in substance and effect and that School District is impliedly exempt from paying special assessments. Contrary to Water District's assertion, the California Supreme Court's remark about payment of the entire cost of capital improvements by private customers was not a part of its rationale, much less its holding.

Water District did not present its purported federal or state constitutional objections until several days after the California Supreme Court filed its opinion, which was not favorable to Water District. Contrary to Water District's assertion, the points in Water District's petition for a rehearing could have been presented at the time of the first appeal as further reasons for the appellate court to uphold the trial court's ruling. Those points could have been considered in the proceedings below, but Water District failed to raise them.

The petition for rehearing was denied without comment. The California Supreme Court generally does not grant a petition for rehearing which attempts to discuss the case on points which were not discussed in the briefs or raised in oral argument before it.

Very shortly before the expiration of the period within which a petition for a writ of certiorari could be filed, Water District filed and served the instant petition, requesting that "the misdirection of the California Supreme Court be righted." Respondent School District's position

is that the matter has been properly adjudicated in all respects and that the Fourth District Court of Appeal, to which the matter was remanded for a determination of whether the School District is entitled to a refund of the fees it has paid, should proceed with that determination.

ARGUMENT

I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A.

WATER DISTRICT'S CONSTITUTIONAL ARGUMENTS ARE UNTIMELY.

As stated above, Water District failed to present any state or federal constitutional issues until *after* the California Supreme Court had filed its opinion, although there was no prohibition, restraint or disability which precluded Water District from raising such issues as early as the proceedings in the trial court. The proposition that a federal question is raised too late if it is not presented *prior* to the decision of the state court of last resort is well settled. *Spies v. Illinois,* 123 U.S. 131 (1887); *Sayward v. Denny,* 158 U.S. 180 (1895); *Citizens' Sav. Bank v. Owensboro,* 173 U.S. 636 (1899). Failure to raise the issue of whether regulations governing the use of school property for non-school purposes were unconstitutionally vague in the state court proceedings was fatal to raising the issue on petition for writ of certiorari. *Ellis v. Dixon,* 349 U.S. 458, *reh'g denied,* 350 U.S. 855 (1955). As recently as

1969, the United States Supreme Court stated that it will not decide federal constitutional issues raised for the first time on review of state court decisions. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). This pronouncement is in accord with *Missouri etc. R. Co. v. Sealy*, 248 U.S. 363 (1919), where the court stated that it will not consider a federal question presented too late for a state court's consideration. Generally, presenting constitutional questions for the first time in a petition for a rehearing to a state court of last resort is too late. *See*, e.g., *Montana v. Rice*, 204 U.S. 291 (1907).

Furthermore, this court has repeatedly indicated that a federal right must be asserted in *and passed upon by* the state court in order for the federal Supreme Court to review a claim that the right was denied. *See Louisville, etc. R. Co. v. Woodford*, 234 U.S. 46 (1914); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291 (1903); *Chemical Nat. Bank v. City Bank*, 160 U.S. 646 (1896). Water District utterly failed to assert any federal rights at the state trial court level or at any time until several days *after* the filing of California Supreme Court's opinion. It then presented arguments based on the rights of third persons, who had not suffered any harm and who were in no need of a spokesperson. The California Supreme Court did not address these belatedly raised issues. They are not properly before this court. Water District's last-ditch effort to avert an unfavorable judicial decision does not merit the court's consideration.

B.

THE CALIFORNIA SUPREME COURT'S DECISION ADDRESSED ONLY MATTERS OF STATE OR LOCAL CONCERN AND WAS BASED ON STATE LAW.

As explained above, the preliminary issue in this case was whether sewer capacity fees are special assessments under California law. The parties were two local public entities. The other key issue in the case was whether School District had any payment obligation with respect to such fees. The determination of that issue depended upon the outcome of the primary issue. No federal constitutional rights were in question. Thus, the dispute was one of local, not national, significance.

Resolution of the issues depended on the interpretation and application of California, not federal, law to the facts of the matter. At no time was the constitutionality of any California statute ever in question. Even a cursory reading of the California Supreme Court's opinion reveals that it is based solely on California law. In deciding this matter, there was no call or necessity for discussing or interpreting any portion of the Constitution of the United States or any federal statute, and the California Supreme Court properly refrained from doing so. The dispute was a matter of state law only, and the California Supreme Court resolved the dispute before it according to California law. The court was not called upon to decide any issues about federal constitutional rights and did not do so.

It has long been accepted that the United States Supreme Court will not review a state court's judgment if that judgment rests on an adequate state ground. *Hammerstein v. Superior Court of California in and for Los*

Angeles County, 340 U.S. 622 (1951). This is true even if there were federal grounds for the judgment. *Fay v. Noia,* 372 U.S. 391 (1963). In the matter at bench, the judgment is based only on California law, the validity of which is not in question. Thus, there are adequate state grounds for the judgment, and federal grounds are absent.

A state court's decision which is based on local law and does not involve constitutional questions is not reviewable in the United States Supreme Court. *Hartford Life Ins. Co. v. Blincoe,* 255 U.S. 129 (1921); *Hibben v. Smith,* 191 U.S. 310 (1903). That is precisely the type of judgment involved here, and it should be allowed to stand. The federal Supreme Court should not review a judgment involving local law (provisions of the California Constitution, the California Education and Water Codes and California decisional law) as applied by local courts to resolve local issues. *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667 (1950). State sovereignty over local taxation matters should be respected.

C.

THERE IS NO QUESTION OF FEDERAL LAW.

Although filing a petition for a writ of certiorari is a correct procedure for seeking Supreme Court review of a state court decision which an aggrieved party perceives as violating a federal constitutional right, privilege or immunity, the granting of the petition is a matter of the court's discretion, which is exercised "only when there are special and important reasons." 28 U.S.C.A. § 1257 (3); U.S. Sup. Ct. Rule 17.1, 28 U.S.C.A. Rule 17.1 sets forth three instances which usually call for granting a petition for writ of certiorari. Although the list is not all-

inclusive, the matter at bench does not fall within any of the categories.

For one thing, throughout the proceedings below, the validity and constitutionality of the California statutes relied upon by both parties were never challenged. No federal laws were invoked by either party. In addition, until it filed the Petition for Rehearing, Water District failed to present its constitutionally-based arguments. Since such arguments were not made in a timely fashion, the California Supreme Court did not address them. As a general rule, the California Supreme Court does not grant a petition for rehearing which attempts to discuss the case on points which were not discussed in the briefs or raised in oral argument before it. *See San Francisco v. Pacific Bank*, 89 Cal. 23, 25, 26 P. 615 (1891).

The decision of the California Supreme Court resulted from the reasoned interpretation of California law. No questions of federal law were considered, much less involved in this case. The California Supreme Court properly restricted its review to the actual controversy before it, namely, whether sewer capacity fees are special assessments. That is an issue having only state-wide significance. To say that the California Supreme Court failed to exercise judicial restraint to avoid constitutional issues is absurd.

Although the absence of a federal question does not mean automatic denial of a petition for a writ of certiorari, it is a highly significant factor which, either alone or taken in conjunction with Water District's lack of standing should convince this court to deny Water District's petition.

D.

WATER DISTRICT LACKS STANDING.

One of the major jurisdictional barriers which Water District has failed to surmount in this challenge to the California Supreme Court's decision is its lack of standing to seek review of the decision on the grounds stated in the petition. Water District claims that the decision "mandates" violations of the Takings Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. While School District strongly disagrees with these claims, there is a threshold obstacle which prevents this court from addressing the positions of the parties: The constitutional rights which might allegedly be violated are not Water District's, nor do the rights belong to anyone under whom Water District is entitled to claim. Generally, a party seeking review must show that enforcement of a judgment would deprive it, not another, of rights arising under the federal Constitution. *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op Marketing Ass'n.*, 276 U.S. 71 (1928).

There is well-established precedent for the proposition that a party is not entitled to review of a decision concerning a title, right, privilege or immunity which was not asserted by that party for itself in the proceedings below or which belongs to a third person under whom the party does not claim. *See*, e.g., *Strader v. Baldwin*, 50 U.S. 261 (1850); *Manning v. French*, 133 U.S. 186 (1890); *Owings v. Norwood*, 9 U.S. 344 (1809); *Miller v. Lancaster Nat. Bank*, 106 U.S. 542 (1883). Water District did not assert its own Fifth or Fourteenth Amendment rights at any stage of the proceedings below, nor does it do so in the in-

stant petition. The constitutional rights of Water District's private customers are rights of third persons under whom Water District is not entitled to claim. The rights of these third persons are not available as a basis for Water District's challenge to the California Supreme Court's decision.

In its discussion of the purportedly mandated violation of the Takings Clause of the Fifth Amendment, the Water District does not claim that its own rights are threatened. At the beginning and the end of Point II of the Petition, Water District emphasizes that its private customers, who are third persons, may be deprived of their Fifth Amendment right (Petition, pp. 10, 15). This reliance on third persons' rights is impermissible and cannot support Water District's petition.

When one reads Water District's argument about the purportedly mandated violation of the Equal Protection Clause of the Fourteenth Amendment, it quickly becomes apparent that Water District is not asserting its own rights but is again mistakenly relying on rights of third persons under whom it is not entitled to claim. It is widely recognized that, in order to have standing to assert a claim of unequal or discriminatory treatment under the Fourteenth Amendment's Equal Protection Clause, one must be a member of the class allegedly prejudiced. *Lague, Inc. v. State,* 136 Vt. 413, 392 A.2d 942 (1978); *State v. Bergun,* 56 Ohio St.2d 354, 10 Ohio Op.3d 485, 384 N.E.2d 255 (1978). Petitioner herein is not a private customer of itself and, thus, is not a member of the class which is allegedly threatened.

Water District cannot base its request for a review of the California Supreme Court's decision on the allegedly threatened rights of third persons.

E.

THERE HAS BEEN NO VIOLATION OF CONSTITUTIONAL RIGHTS REQUIRING REDRESS.

As shown above, Water District has not asserted that any constitutional rights of its own have been violated in any way as a result of the decision under attack. Water District has not suffered any direct or indirect constitutional harm. Since there is no harm or injury of a constitutional nature to be redressed by judicial review, the decision does not merit this court's attention.

Furthermore, contrary to Water District's assertion, the constitutional rights of third persons have not been violated. Such rights were never the subject matter of this lawsuit and thus, were never adjudicated. The purportedly "mandated" violations are purely a matter of Water District's opinion, based on dictum, and were merely the only means available for framing the instant petition.

Assuming, *arguendo*, that third persons have suffered constitutional harm from the California Supreme Court's decision, there is nothing to prohibit such persons from speaking for themselves and directly seeking redress of the wrong done to them. They do not require a representative or spokesperson, which is the role Water District has apparently assumed in order to be able to present its petition. However, as demonstrated above, it is impermissible for Water District to base its challenge to the California Supreme Court's decision on the rights of third persons. Even more fundamental is the absence of any actual, demonstrable violation of anyone's constitutional rights. Without a wrong, there cannot be a remedy. Thus,

judicial review by this court of the California Supreme Court's decision is inappropriate.

II

THE CALIFORNIA SUPREME COURT RESOLVED THE DISPUTE BEFORE IT IN ACCORDANCE WITH ACCEPTED PRINCIPLES.

Water District contends that in resolving the limited issues presented by this matter, the California Supreme Court failed to interpret legislation in a manner that avoided constitutional questions. At first blush, a purported violation of a cardinal principle seems to be a convincing reason for granting Water District's Petition. However, the claim fails to withstand scrutiny. Water District has chosen to ignore certain points which demonstrate the weakness of Water District's position.

First of all, with respect to the primary issue, the nature of the capacity fees, the conclusion that such fees are special assessments rests primarily on the evaluation and application of precedent in the form of California judicial decisions, *not* statutory construction (pp. A-6 through A-13, Appendix A of the Petition for Writ of Certiorari). Public entities, such as School District, are impliedly exempt from special assessments as a result of a 1929 California Supreme Court decision which has not been overruled legislatively or otherwise. *Inglewood v. County of Los Angeles,* 207 Cal. 697 (1929). Water District has not challenged the constitutionality of such implied exemptions.

Water District, realizing that the capacity fees could be found to constitute special assessments, argued that there was *express* legislative authority for requiring School District to pay the capacity fees. Such an argument re-

quired the California Supreme Court to examine the statutes upon which Water District relied. No issue was raised about ambiguous language. The California Supreme Court concluded that the statutes did *not* expressly authorize special assessments against School District. In the absence of express authorization, the California Supreme Court upheld the policy of preventing one tax-supported entity from siphoning tax money from another such entity. If such a policy were not upheld, the results could be adverse and severe for public entities, including, without limitation, inability to perform necessary functions due to diminished monetary resources resulting from having to pay a high or unexpectedly imposed special assessment.

School District does not deny that a court should interpret ambiguous statutes in a way that avoids constitutional questions. However, the California Supreme Court did not ignore that general rule in this particular case. Water District did not raise any constitutional issues that had to be avoided. Unlike the primary issue in *Young v. Haines,* 41 Cal.3d 883 (1986), the primary issues in the instant matter were decided without statutory aid or interpretation. Unlike the statutes in *Young,* the statutes which were examined were unambiguous. Unlike the minor plaintiff in *Young,* Water District failed to raise any constitutional issues at the earliest opportunity. Finally, the decision resolved the precise issues involved and no more. Constitutional questions were neither presented nor adjudicated and, thus, were avoided. There is no basis for concluding that the California Supreme Court failed to properly discharge its judicial duty.

III

THE DECISION OF THE CALIFORNIA SUPREME COURT DOES NOT MANDATE A VIOLATION OF THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT.

As stated above, this matter presented two basic issues of local (state) importance: (1) whether capacity fees are special assessments under California law and (2) whether School District, a state agency, was liable to Water District, a County agency, for payment of them. Those were the issues resolved. Since Water District failed to raise any constitutional issues in a timely manner, it cannot reasonably complain that such issues were not addressed. To base a petition for a writ of certiorari on a mere comment in a decision which did not resolve *absent* issues, as Water District has done here, is even more unreasonable.

Contrary to Water District's assertion, the California Supreme Court did not "mandate" any violations of the Fifth Amendment. It ruled that sewer capacity fees are special assessments from which School District, a public entity, is impliedly exempt according to well-established precedent. The court invited the California Legislature to examine the implied exemption and establish a new rule if it saw fit. That invitation is apparently being accepted by the Legislature.

Water District's argument about the purported violation of the Takings Clause of the Fifth Amendment is a bit opaque. It is not clear whose Fifth Amendment rights are supposedly threatened or exactly what the threat is. Water District is not entitled to base any claim on third persons' rights. It must be remembered that School District does pay a fee for having its buildings physically

connected to Water District's sewer lines (hook-up fee) and monthly service charges based on the amount of sewage discharged each month. Thus, School District pays for its actual, demonstrable use of Water District's facilities. It cannot reasonably be said that a violation of the Fifth Amendment Takings Clause has resulted from such conduct.

The ruling that School District is impliedly exempt from paying sewer capacity fees is a matter of state law and policy, not the Fifth Amendment. This case did not arise from a properly-mounted Fifth Amendment challenge to School District's status but from a dispute over whether School District owed Water District money for capacity fees. This simple dispute was resolved in School District's favor.

Water District's disappointment in the result has prompted it to attempt to expand this case into one of constitutional magnitude. What Water District appears to forget while claiming that School District is getting something for nothing (and thus allegedly violating *someone's* constitutional rights), is that the record in this case is entirely bereft of any proof that Water District has required increased capacity or, more importantly, that School District's use of Water District's facilities has been on the increase or caused any need for greater sewer capacity. The California Supreme Court ruled on the precise issues properly before it. Its decision has upheld state law and policy, not "mandated" violations of the Fifth Amendment. The decision was much more the result of application of precedent than construction of statutes. Interestingly, Water District has failed to specify the statutes which have purportedly been drawn into question.

Finally, as demonstrated above, Water District is not entitled to raise third persons' rights in seeking review of the California Supreme Court's decision, especially when there is an absence of harm.

IV

ASSUMING, ARGUENDO, THAT THERE HAS BEEN A CLASSIFICATION OF WATER DISTRICT'S CUSTOMERS, SUCH CLASSIFICATION FURTHERS LEGITIMATE INTERESTS, AND THE "RATIONAL BASIS" TEST IS PASSED.

Water District has waved the Equal Protection Clause violation red flag in hopes of attracting this Court's attention to a local dispute. This lure must fail for several reasons. First of all, Water District does not belong to the allegedly prejudiced class and is not entitled to base its challenge on third persons' rights. Secondly, the decision is based on non-statutory precedent, so Water District's recitation of principles of statutory interpretation is inapposite. Thirdly, the California Supreme Court's decision does not "mandate" any violation of the Fourteenth Amendment. The Court resolved the issues before it utilizing well-established judicial precedents. There was no Fourteenth Amendment issue to resolve, and accordingly, the Court did not engage in any Equal Protection analysis. Nevertheless, Water District claims that the California Supreme Court "classified" Water District's customers, and that such classification fails to withstand scrutiny under the "rational basis" test. Such a claim is based on a misinterpretive reading of the decision.

Assuming, *arguendo*, that Water District is the proper party to raise the purported violation of the Equal Pro-

tection Clause, there are legitimate interests which are well-served by the California Supreme Court's decision holding that School District is impliedly exempt from paying capacity fees, which were found to be special assessments. One of the chief interests was enunciated by the California Supreme Court in 1948: To prevent one tax-supported entity from siphoning tax money from another such entity. *Eisley v. Mohan*, 31 Cal.2d 637, 642 (1948). Protecting this interest furthers several other legitimate interests of mainly local concern. For example, it enables public entities to perform their functions free of interference or inability caused by reduced monetary resources. The assessed public entities may not be able to offset the special assessments by collecting an increased amount of revenue from their sources, thus facing an overall reduction of financial resources. Their ability to serve their constituents would suffer, with their constituents suffering the most harm in the long run.

It is also desirable for public entities to be protected from the uncertainty which would result from the inability to predict when a special assessment might be imposed or increased. Such uncertainty would make budgeting and planning even more difficult than they already are.

If some public entities were allowed to impose special assessments on other public entities, the former could freely appropriate the funds of the latter. This would interfere with the Legislature's appropriations process. Another negative result would be the loss of accountability. The source of funds for the assessed public entity is not always identical to the assessing public entity's constituency. Elected officials should be allowed to appropriate only such funds as they levy upon their constituents. There

is no basis for allowing elected officials to assess a public entity such as School District and thus indirectly exact contributions from non-constituents.

A final example of a legitimate interest is the avoidance of undue burden on the courts. Once imposition of one type of special assessment on one type of public entity is allowed, a precedent will be set. The assessed public entities will likely decide to legally challenge every special assessment with which they are faced in order to try to protect their limited financial resources.

All in all, upholding the public entity implied exemption from special assessments, as was done here, fulfills several legitimate state and local interests. Therefore, even if the rational basis test were applicable in this instance, the decision under attack would stand.

———————o———————

CONCLUSION

The California Supreme Court correctly resolved the issues which were properly before it and did not mandate any violations of any provisions of the Constitution of the United States. Since the issues in the case did not present federal questions, and resolution of the issues did not call for or result from the interpretation or application of federal law, Water District's talismanic invocation of Fifth and Fourteenth Amendment violations is insufficient reason for this Court to exercise its discretion and issue a writ of certiorari. School District respectfully requests that the United States Supreme Court deny Water District's petition and award School District its costs.

Dated: January 15, 1987

Respectfully submitted,

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